



Billing Code 3720-58

## **DEPARTMENT OF DEFENSE**

### **Department of the Army, Corps of Engineers**

#### **33 CFR Part 334**

#### **[COE-2017-0006]**

### **Little Creek Harbor, Fisherman's Cove, Joint Expeditionary Base Little Creek-Fort Story, Little Creek, Virginia, Restricted Areas.**

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Final rule.

**SUMMARY:** The Corps of Engineers is establishing restricted areas in the waters of Fisherman's Cove and Little Creek Harbor at Joint Expeditionary Base Little Creek-Fort Story, Little Creek (JEBLCFS) in Virginia Beach, Virginia. JEBLCFS is the homeport of numerous ships, small boats, and special operational units. The restricted areas are necessary to better protect vessels and personnel assigned to JEBLCFS by implementing a waterside security program. The regulation establishes the restricted areas in waters within the boundary of the existing installation and in the entry channel into the harbor.

**DATES:** Effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** U.S. Army Corps of Engineers, Attn: CECW-CO (David Olson), 441 G Street NW, Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, D.C. at 202-

761-4922, or Ms. Nicole Woodward, Corps of Engineers, Norfolk District, Regulatory Branch, at 757-201-7122.

**SUPPLEMENTARY INFORMATION:** The proposed rule was published in the May 23, 2018, edition of the Federal Register (83 FR 23867) and the regulations.gov docket number was COE-2017-0006. In response to the proposed rule, two comments were received.

One commenter stated that additional clarification was needed regarding the coordinates for the proposed restricted areas because as written it is unclear what the intended extent of the areas should be. The Navy provided corrected coordinates and modified the rule text to address the charting concerns.

Another commenter questioned the need for the additional restrictions to enhance security within the waterway, and the commenter expressed concerns regarding the enforceability of the proposed restrictions, as well as what impacts they would have on local businesses, property values, and navigational access. The proposed rule would have provided greater restrictions within Little Creek Harbor, including requiring all vessels transiting inbound/outbound of the Outer Harbor to notify the Little Creek Port Control of their destination and intentions using VHF-FM channel 12 at all times. In response to these comments, the restrictions were modified to allow for all privately owned vessels, properly registered and bearing identification in accordance with Federal and/or State laws and regulations, and all Government owned vessels (public vessels), to enter or exit the restricted area at any time at a speed commensurate with minimum wake, except for when the Commanding Officer, JEBLCFS, is ordered

to implement Force Protection Condition (FPCON) Charlie/Delta, or when specific authority is granted by the District Engineer, at which time vessel traffic movement within the Outer Harbor may be restricted temporarily. This rule will not prevent the public from entering the areas at all times; it will merely restrict the amount of time during which individuals may enter and stay within those areas, particularly during periods of increased threats. In order to improve the safety of military assets, as well as to the public, the rule also requires vessels entering those areas to provide additional notification and be given permission to enter the area. The regulation does not grant the Navy additional legal authority beyond their current authorities; however, it allows them to use additional resources to enforce the waterway, such as the U.S. Coast Guard and Virginia Marine Resource Commission acting within their own authorities to police the waterway. If conditions warrant elevating restrictions within the Outer Harbor Restricted Area due to implementation of FPCON Charlie/Delta or when specifically authorized by the District Engineer, then JEBLCFS will coordinate with the U.S. Coast Guard to allow vessel entry into the restricted area upon request. Vessels will still be able to transit the waterway to access the businesses and private properties located upstream of the restricted area; therefore, the impacts on businesses and property values are anticipated to be minimal.

Due to the location of JEBLCF, which is located south of a narrow inlet off of the Chesapeake Bay, alternatives to the location of a restricted area within the waterway near the entrance to the water based side of the installation are limited.

This regulation establishes a restricted area within the Outer Harbor which will be enacted on a temporary basis during periods of heightened threat conditions.

Reducing the speeds of vessels within the waterway allows the Navy to better assess vessels as they approach through the narrow opening to the Inner Harbor. The Navy will be better able to determine whether the vessels are a threat intending to approach the installation or if they will make the 90-degree turn west toward the commercial and private facilities within Fisherman's Cove. Full-time restrictions on the Inner Harbor Restricted Area will allow the Navy to assess the safety of all vessels that approach in close vicinity of Government owned vessels and property in order to better protect those military assets and the personnel stationed at Little Creek. There are current measures in place, such as existing barriers and regulations to protect the Navy vessels within the harbor. However, the restricted areas will provide a more permanent safety measure and allow for enhanced measures to be enacted to protect additional property and personnel within the installation as needed.

In response to the Norfolk District's public notice, 178 individuals submitted requests to the district for a public hearing. The purpose of a public hearing is to gain information regarding the proposal that is pertinent to the decision-making process that cannot be obtained through other means. In accordance with the Corps' regulations at 33 CFR 334.4(c), the district engineer decides whether to hold a public hearing for a proposed restricted area or danger zone. The Norfolk District denied the request for a public hearing because it determined that, through the proposed rule published in the Federal Register and

the public notice for the proposed rule issued by the Norfolk District, it received sufficient information to evaluate the proposal, and that the comments received in response to the proposed rule have been fully addressed. Therefore, we have determined that public hearing is not necessary in order to make a decision because a public hearing is unlikely to provide additional substantive information for this rulemaking action.

In response to a request by the United States Navy, and pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3), the Corps of Engineers is amending 33 CFR Part 334 to establish a permanent restricted area, in the waters of Fisherman's Cove and Little Creek Harbor adjacent to Joint Expeditionary Base Little Creek-Fort Story, Little Creek (JEBLCFS) in Virginia Beach, Virginia.

#### Procedural Requirements

##### a. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. For the reasons stated below, this final rule is not a “significant regulatory action” under Executive Order 12866. Accordingly, this final rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

The Corps determined this final rule is not a significant regulatory action because this restricted area regulation allows all privately owned vessels that are properly registered and bearing identification in accordance with federal and/or state laws and regulations, as well as all government-owned vessels, to enter or exit the Outer Harbor restricted area at any time at a speed commensurate with minimum wake, except when the Commanding Officer, JEBLCFS, is ordered to implement Force Protection Condition (FPCON) Charlie/Delta, or when specific authority is granted by the District Engineer, at which time vessel traffic movement within the Outer Harbor may be restricted temporarily. The Inner Harbor Restricted Area is restricted to those privately owned vessels or persons calling upon the commercial/private piers located within the Inner Harbor and government-owned vessels transiting to and from U.S. Navy or U.S. Coast Guard facilities and authorized DOD patrons of the U.S. Navy recreational marina, plus any other vessels or persons granted specific authorization by Commanding Officer, Joint Expeditionary Base Little Creek-Fort Story, and/or other persons or agencies as he/she may designate. This rule is issued with respect to a military function of the Department of Defense and the provisions of Executive Order 12866 do not apply.

b. Impact on Small Entities.

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are

not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Corps certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels that intend to transit the restricted area may be small entities, for the reasons stated in paragraph (a) above, this rule would not have a significant economic impact on any vessel owner or operator because it allows, with exceptions provide in the rule text, all privately owned vessels that are properly registered and bearing identification in accordance with federal and/or state laws and regulations, as well as all government-owned vessels, to enter or exit the restricted areas at any time at a speed commensurate with minimum wake. In addition, the restricted areas are necessary to protect vessels and personnel assigned to JEBLCFS by implementing a waterside security program. Small entities can also utilize navigable waters outside of the restricted areas. Small entities that need to transit the restricted areas may do so as long as the operator of the vessel obtains permission from Little Creek Port Control or the Commanding Officer, JEBLCFS, and/or other persons or agencies as he/she may designate. The restricted areas are necessary for security of JEBLCFS. After considering the economic impacts of this final restricted area regulation on small entities, I certify that this action will not have a significant impact on a substantial number of small entities.

c. Review under the National Environmental Policy Act.

Due to the administrative nature of this action and because there is no intended change in the use of the area, the Corps expects that this regulation, if adopted, will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement is not required. An environmental assessment has been prepared. It may be reviewed at the District office listed at the end of the FOR FURTHER INFORMATION CONTACT section, above.

d. Unfunded Mandates Act.

This proposed rule does not impose an enforceable duty among the private sector and, therefore, it is not a Federal private sector mandate and it is not subject to the requirements of either Section 202 or Section 205 of the Unfunded Mandates Act. We have also found under Section 203 of the Act, that small governments will not be significantly and uniquely affected by this rulemaking.

e. Congressional Review Act.

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the



Federal Register. This final rule is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps amends 33 CFR part 334 as follows:

PART 334 -- DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for 33 CFR Part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Add 334.305 to read as follows:

§ 334.305 Little Creek Harbor, Fisherman's Cove, Joint Expeditionary Base Little Creek-Fort Story, Little Creek, Virginia, Restricted Areas.

(a) The Little Creek Restricted Areas. The Little Creek Restricted Areas consist of two distinct areas: The Outer Harbor Restricted Area and the Inner Harbor Restricted Area. The datum for the coordinates in this section is NAD–83.

(1) The Outer Harbor Restricted Area. The waters within an area beginning at latitude 36°55'57.7" N, longitude 76°10'35" W; thence southwesterly to a point at latitude 36°55'53" N, longitude 76°10'44" W, thence southerly to latitude 36°55'21.2" N, longitude 76°10'42" W; thence southwesterly to latitude 36°55'18.3" N, longitude 76°10'49" W; thence northwesterly to a point in

Fisherman's Cove at latitude 36°55'22" N, longitude 76°11'15.5" W; thence southerly to latitude 36°55'19.2" N, longitude 76°11'16" W, thence easterly near the southern shoreline of Fisherman's Cove, to latitude 36°55'15.8" N, longitude 76°10'58.8" W; and ending at latitude 36°55'18" N, longitude 76°10'30" W; thence to the point of origin.

(2) The Inner Harbor Restricted Area. The waters within Little Creek Harbor south of a line beginning at latitude 36°55'15.8" N, longitude 76°10'58.8" W; and ending at latitude 36°55'18" N, longitude 76°10'30" W.

(b) The regulations—(1) The Outer Harbor Restricted Area. (i) All privately owned vessels, properly registered and bearing identification in accordance with Federal and/or State laws and regulations, and all Government owned vessels (public vessels) may enter or exit the waters described in paragraph (a)(1) of this section at any time and transit inbound/outbound of the marked dredged channel leading to Little Creek Harbor between jetties 8 miles westward of Cape Henry Light. All vessels transiting inbound/outbound of the channel except for those vessels listed in paragraph (c)(2) of this section shall proceed at speeds commensurate with minimum wake. Any vessel equipped with a marine radio can monitor VHF-FM channel 12 for message traffic from Little Creek Port Control.

(ii) When Commanding Officer, Joint Expeditionary Base Little Creek-Fort Story is ordered to implement Force Protection Conditions (FPCONs) Charlie/Delta, or when specific authority is granted by the District Engineer, all

vessel traffic movement can be restricted except for those vessels that meet the criteria in paragraph (c)(2) of this section. FPCONS are a system of protective measures used by the Department of Defense (DOD) installations to guard against and deter terrorist attack. Senior commanders assign the FPCONS for their region, and installation commanders may raise FPCONS and tighten security measures based on local conditions. In the event FPCONS Charlie/Delta is implemented by the Commanding Officer, Joint Expeditionary Base Little Creek, which requires the restriction of vessel traffic movement in the Outer Harbor Restricted Area, the installation will coordinate with the U.S. Coast Guard, Fifth District; Army Corps of Engineers, Norfolk District; and state and local law enforcement and governmental authorities. The installation will also disseminate information to the public and local news media outlets. Information on whether vessel traffic movement has been restricted in the Outer Harbor Restricted Area due to the implementation of FPCONS Charlie/Delta will also be published and disseminated by the U.S. Coast Guard.

(2) The Inner Harbor Restricted Area. All vessels or persons intending to transit inbound/outbound of the Inner Harbor Restricted Area shall request permission from Little Creek Harbor Port Control using VHF-FM channel 12 prior to transiting and will provide their destination/ intentions with the exception of those vessels that meet the criteria in paragraph (c)(2) of this section. The Inner Harbor Restricted Area is limited to those privately owned vessels or persons calling upon the commercial/private piers located within the Inner Harbor and government owned vessels (public vessels) transiting to and from U.S. Navy or

U.S. Coast Guard facilities and authorized DOD patrons of the U.S. Navy recreational marina. No other vessels or persons may enter or exit this area unless specific authorization is granted by Commanding Officer, Joint Expeditionary Base Little Creek-Fort Story, and/or other persons or agencies as he/she may designate.

(3) All vessels or persons transiting inbound/outbound of the Inner Harbor Restricted Area are subject to all applicable federal and state laws including laws or regulations designed to protect the naval facility and persons or vessels assigned therein. Federal and state law enforcement officials may at any time take action to ensure compliance with their respective laws. In addition, this regulation authorizes Navy security personnel, designated by Commander, Joint Expeditionary Base Little Creek-Fort Story or persons authorized to act in his/her behalf, the authority to ascertain the identity and intent of any vessels and/or persons transiting the restricted area that indicate by way of appearance or action they are a possible threat to government assets. If a determination is made that the vessel and/or persons are a threat to government assets located within the restricted area, Navy security units may take actions as provided by law or regulation that are deemed necessary to protect government personnel and assets located within the restricted area.

(c) Enforcement. (1) The regulation in this section shall be enforced by the Commanding Officer, Joint Expeditionary Base Little Creek-Fort Story, U.S.

Coast Guard, local/state law enforcement, and/or persons or agencies as he/she may designate during emergency situations.

(2) Federal and state law enforcement vessels and personnel may enter anywhere in the restricted area at any time in the operation of their statutory missions or to enforce their respective laws.

(3) Nothing in this regulation is deemed to preempt 33 CFR 165.501.

(4) Vessels or persons calling upon the commercial/private piers located within the Inner Harbor with proper identification and clearance will be allowed entry subject to the same provisions described in paragraph (b) of this section. Commanding Officer, Joint Expeditionary Base Little Creek-Fort Story reserves the right to temporarily deny entry in emergency situations, elevated DOD Force Protection conditions in the Harbor, or other safety of navigation constraints.

Dated: August 1, 2019.

Thomas P. Smith, P.E.

Chief, Operations and Regulatory Division

Directorate of Civil Works

[FR Doc. 2019-16972 Filed: 8/7/2019 8:45 am; Publication Date: 8/8/2019]